

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-1476

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x

UNITED STATES OF AMERICA,

v.

77-1476

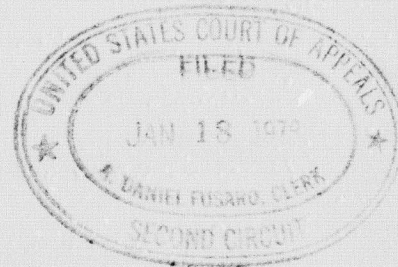
MANUEL FERNANDEZ,

Defendant-Appellant.

-----x

B
p/s

APPENDIX



DAVID G. TRAGER
United States Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York
AUSA Marilyn Gainey

SAMUEL W. GILMAN
Attorney for Defendant-Appellant
401 Broadway
New York, New York 10013
Phone: (212) 349-0378

I N D E X

	<u>Page</u>
Docket Entries.....	a.-b.
Indictment.....	c.-e.
Judgment and Probation/Commitment Order.....	e.
Colloquy (re: appointment of interpreter).....	3-7, 17
Prosecutor's Opening Statement.....	20
Testimony of Vincent LaMorte.....	51, 74-75
Testimony of Kahn.....	241-244
Prosecutor's Summation.....	449-450
Additional Instructions to Jury.....	545-546
Affidavit of Samuel W. Gilman (Motion to acquit)..	g.-j.

PAGINATION AS IN ORIGINAL COPY

U.S. TITLE SECTION
T-18,2314,2315, Did conspire with other to transport 3 in i.c.c. stolen oriental rugs etc.



9 MAG
CASE NO. **7-a**
BAIL **RE**
Arrested **RE**
Detained **RE**
25
11-3-76
Disposition of Charges
☒ Convicted
☐ Acquitted
☐ Dismissed
☐ On Government's Motion

II. KEY DATES & INTERVALS

ARREST or	INDICTMENT	ARRAIGNMENT	TRIAL
U.S. Custody Began	High Risk Date	Information ☐ 11-22-76	Trial Set For 2-28-77
Summons Served	Indict. Waived ☐	1st Plea 11-30-76	Trial Began 4/5/77
First Appearance 11-3-76	In Charging District	Superseding ☐ Indict/Info ☐	Trial Ended 5.3.77
		Final Plea	
		☒ NG ☐ G ☐ NOL	

		MAGISTRATE		OUTCOME	
Search Warrant	Issued	DATE	INITIAL/NO.	INITIAL APPEARANCE DATE	INITIAL NO.
Summons	Issued	11-1-76	ASC/07E	PRELIMINARY EXAMINATION OR REMOVAL HEARING ☒ 11-23-76	☒ HELD FOR OR OTHER REASONING IN THIS DISTRICT
Arrest Warrant Issued	Served				
COMPLAINT		11-1-76	ASC/07E	☒ WAIVED ☐ NOT WAIVED	
OFFENSE (In Complaint)		receive, conceal and store a quantity of antique oriental T-18 USC Section 2315 and 2.			

U.S. Attorney or Asst: **Scotti Gainey**
ATTORNEYS: **Daniel Gilman, Esq.**
401 B'way, NYC
349-0378

* Show last names and suffix numbers of other defendants on same indictment information

DATE	PROCEEDINGS
11-22-76	MILLER 1; JOHNSON 2; GARCIA 3; SCHNITZER 4. Before Catoggio, J. - Indictment filed.
11-30-76	Before Costantino, J.- Case Called. Deft. & Counsel present. Deft. Arraigned and enters a plea of not guilty. All motions by 1-7-77 and Case set down for Trial on 2-28-77.
2.28.77	Before Costantino, J.- Case Called. Deft. & Counsel present. Case set for Trial on 4.25.77.
4/18/77	Before Costantino, J--case called & adjd to 4/25/77 for trial.JLJ
4-25-77	Before Costantino J - case called - deft & atty Gilman present - trial ordered and begun - Jurors selected and sworn. Trial contd to 4-26-77. rs.
4-26-77	Before Costantino J - case called - deft & counsel present with interpreter - trial resumed - trial contd to 4-27-77. rs.
4.27.77	Before Costantino, J.- Case Called. Trial resumed. Trial continued 4.28.77.
4/28/77	Before Costantino, J case called-deft & atty present trial resumed-trial contd to 5/2/77.JLJ

Oves

DEPUTY CLERK

Before Costantino, J.- Case Called. Deft. & Counsel present. Trial resumed. Govt. sums up. Deft. sums up. Court charges Jury at 1:15 P.M. Order of sustenance signed. Jurors deliberate at 3:45 P.M. Order of sustenance signed. Jury returns at 9:15 P.M. and finds Deft. GUILTY on Counts 1, 2, and 3. Jury polled and excused. Trial concluded.

By Costantino, J.- Order of Sustenance filed.

By Costantino, J.- Order of Sustenance filed.
Transcript filed dated 4 23 75

Transcript filed dated 4-27-77

Notice of motion filed received from Chambers
(for judgment of acquittal or new trial etc
Before COSTANTINO J - case called

Before COSTANTINO J - case called on motion for
Judgment of acquittal or new trial - motion argued -
decision reserved. All papers by 6-10-77.
Stenographic

Stenographer's Transcript dated May 3rd, 1977 filed.

Stenographer's Transcript dated May 3rd, 1977 filed.
Stenographer's Transcript dated May 2nd, 1977 filed.

Stenographer's Transcript dated April 28th, 1977 filed.
Memorandum of Law filed.

Memorandum of Law filed in connection with defts motion for a judgment of acquittal or a new trial.
Defts Supplemental Memorandum of his motion for judgment of acquittal filed.

Defts Supplemental Memorandum of his motion for judgment of acquittal filed.

govt's memo in opposition to deft's motion for a judgment of acquittal or a new trial filed in

Before COSTANTINO J - case called filed, jlj
trial adjd at time of sentence - motion for a new

before Costantino J - case called - deft & counsel
by Daniel Gilman present - motion to set aside Jury
dict - motion denied - sentence adjd to Oct. 25, 1977
before COSTANTINO J - case called

before COSTANTINO J - case called - deft & atty Daniel
Gilman present - deft sentenced for 5 yrs under 18:3651 -
to serve 8 mos on weekends to start Fridays at 5 PM
and end on Sundays at 8 PM - to run concurrently on
each of counts 1, 2 and 3 - stay of sentence pending appeal.
Balance of sentence on probation.
Judgment and commitment

certified copies to Marshal & Probation.

appeal mailed to the C of A. and copy of notice

A TRUE COPY ATTEST
12/9/77
LEWIS
BYO
DEPUTY CLERK
DATE

By W. C. 22, 1st 6
Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

7601 30

----- X

UNITED STATES OF AMERICA

INDICTMENT

- against -

Cr. No.
(T. 18, U.S.C., §2314,
2315, 371, 2)

BARRY MILLER,
CHARLES JOHNSON,
JOSE GARCIA,
JOSEPH SCHNITZER and
MANUEL FERNANDEZ,

Defendants.

----- X

THE GRAND JURY CHARGES:

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.

★ NOV 22 1976 ★
TIME A.M.
P.M.

COUNT ONE

On or about May 6, 1976, within the Eastern District of New York, the defendants BARRY MILLER, CHARLES JOHNSON, JOSE GARCIA, JOSEPH SCHNITZER and MANUEL FERNANDEZ did knowingly and wilfully transport and cause to be transported in interstate commerce from the State of New Jersey to the State of New York a quantity of antique oriental rugs having a value in excess of Five Thousand Dollars (\$5,000) which had been stolen in New Jersey, the defendants BARRY MILLER, CHARLES JOHNSON, JOSE GARCIA, JOSEPH SCHNITZER and MANUEL FERNANDEZ knowing the same to have been stolen. (Title 18-United States Code, Section 2314 and 2).

COUNT TWO

On or about May 6, 1976, within the Eastern District of New York, the defendants BARRY MILLER, CHARLES JOHNSON, JOSE GARCIA, JOSEPH SCHNITZER and MANUEL FERNANDEZ did knowingly and wilfully receive, conceal and store a quantity of antique oriental rugs having a value in excess of Five Thousand Dollars (\$5,000) which had been stolen in New Jersey and which were moving as, were a part of and constituted interstate commerce from the State

of New Jersey to the State of New York, the defendants BARRY MILLER, CHARLES JOHNSON, JOSE GARCIA, JOSEPH SCHNITZER and MANUEL FERNANDEZ knowing the same to have been stolen. (Title 18, United States Code, Sections 2315 and 2).

COUNT THREE

On or about May 6, 1976, within the Eastern District of New York, the defendants BARRY MILLER, CHARLES JOHNSON, JOSE GARCIA, JOSEPH SCHNITZER and MANUEL FERNANDEZ did knowingly and unlawfully conspire and agree to commit an offense against the United States in violation of Title 18, United States Code, Sections 2314 and 2315, by knowingly and unlawfully conspiring to transport in interstate commerce from the State of New Jersey to the State of New York a quantity of antique oriental rugs having a value in excess of Five Thousand Dollars (\$5,000) which had been stolen in New Jersey, knowing the same to have been stolen; and by knowingly and unlawfully conspiring to receive, conceal and store the aforementioned rugs which had been stolen in New Jersey and which were moving as, were part of and constituted interstate commerce from the State of New Jersey to the State of New York, knowing the same to have been stolen.

In furtherance of said conspiracy and to effect the objects thereof, the defendants BARRY MILLER, CHARLES JOHNSON, JOSE GARCIA, JOSEPH SCHNITZER and MANUEL FERNANDEZ within the District of New Jersey and within the Eastern District of New York respectively committed the following:

O V E R T A C T S

1. On or about May 6, 1976 the defendants BARRY MILLER, CHARLES JOHNSON and JOSE GARCIA forcibly stole a quantity of antique oriental rugs from the premises of "Kahn's Oriental Rugs", 106 Alexander Street, Princeton, New

2. On or about May 6, 1976 the defendants JOSEPH SCHNITZER and MANUEL FERNANDEZ stored a quantity of stolen antique oriental rugs in a garage at Apollo Street, Brooklyn, New York. (Title 18, United States Code, Section 371).

A TRUE BILL

J. G. Luff
FOREMAN

David G. Trager
DAVID G. TRAGER
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

DEFENDANT

MANUEL FERNANDEZ

DOCKET NO.

76 CR 736

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government
the defendant appeared in person on this date

MONTH DAY YEAR
10-25-77

COUNSEL

☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL

Daniel Gilman

(Name of counsel)

PLEA

☐ GUILTY, and the court being satisfied that there is a factual basis for the plea,☐ NOLO CONTENDERE,☐ NOT GUILTY

There being a finding/verdict of

☐ NOT GUILTY. Defendant is discharged☒ GUILTY. in counts 1, 2 & 3FINDING &
JUDGMENT

Defendant has been convicted as charged of the offense(s) of violating T-18, U.S. Code, Secs. 2314, 2315, 371 & 2, in that on or about May 6, 1976, the defendant, with others, did unlawfully conspire to transport in interstate commerce from the State of New Jersey to the State of New York, a quantity of antique oriental rugs having a value in excess of \$5,000 which had been stolen in New Jersey and had been moving as part of an interstate shipment of freight, knowing the same to have been stolen

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

SENTENCE
OR
PROBATION
ORDER

5 years to serve 8 months on weekends to commence Friday at 5:00 P.M. to Sunday at 8:00 P.M. Sentence to run concurrent-ly on counts 1, 2 & 3 pursuant to T-18, U.S. Code, Sec. 3651. Stay of sentence pending appeal. Balance of sentence on probation.

SPECIAL
CONDITIONS
OF
PROBATION

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.

★ OCT 26 1977 ★

TIME A.M.

P.M.

ADDITIONAL
CONDITIONS
OF
PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT
RECOMMEN-
DATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x

UNITED STATES OF AMERICA

-against-

76 Cr 736

LARRY MILLER, CHARLES JOHNSON, JOSE
GARCIA, JOSEPH SCHWITZER and MANUEL
FERNANDEZ,

Defendants.

-----x

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss:
SOUTHERN DISTRICT OF NEW YORK)

SAMUEL W. GILMAN, being duly sworn, deposes and
says:

1. I am the attorney for the defendant MANUEL FERNANDEZ,
and I make the affidavit herein in support of a motion under Rule
29 of the Federal Rules of Criminal Procedure for a judgment of
acquittal or, in the alternative, a new trial for the defendant
MANUEL FERNANDEZ.

2. The defendant was tried, in conjunction with JOSE
GARCIA, under the indictment herein before Judge Mark A. Costen-
tino and a jury on April 27, April 28, May 2 and May 3, 1977, on
which latter date he was convicted of all three counts of the in-
dictment.

3. The prosecution concerned the transportation in in-
terstate commerce and the receiving and concealing of oriental rugs
valued in excess of \$5,000.00, taken in a robbery in Princeton,
New Jersey by four actual defendants, who transported such rugs to

Brooklyn, New York, where they met their co-conspirators, among whom was alleged to be the defendant FERNANDEZ.

4. It was the theory of the prosecution that FERNANDEZ "fingered" and set up the robbery, based upon his personal knowledge of the premises to be robbed, KAHN's ORIENTAL RUG SHOP, where the best rugs were kept in a safe in the premises. The principal witness against FERNANDEZ testified that, in setting up the job, FERNANDEZ told him, LA MORTE, and the other robbers not to forget to get the rugs from the safe for they were the best rugs. The prosecutor harped continuously on the argument that FERNANDEZ not only knew the owner of the shop that had been robbed but that he was thoroughly familiar with the premises by reason of the facts that he had visited the shop a number of times, although it is conceded that he had not been in the shop for more than two or three years, as was testified to by the owner of the shop and his manager who was the actual physical victim of the robbery.

5. It now develops that the safe in the shop was not installed therein until at least one year after FERNANDEZ's very last visit, and he could not possibly have seen the safe which was then non-existent.

6. It is quite clear that the case was close and that the presentation of the prosecution was not overly strong. There can be no doubt that, had the jury known the truth, namely, that there was no safe in the store at the time FERNANDEZ was there, it would have rejected the testimony of LaMorte and acquitted FERNANDEZ.

7. What makes this matter particularly noteworthy is

the fact that the prosecutor, all the while she was hammering on FERNANDEZ's knowledge of the safe, knew personally that the safe was wholly non-existent at the time FERNANDEZ last visited the shop. When I asked her yesterday why she had not related this fact to me, at least as part of the Brady material, she said that she did not think it was Brady material and, in any event, she did not consider it important.

8. The matter is further complicated by the fact that, although counsel on the record strongly urged that a Spanish interpreter be supplied for the defendant because he, counsel, could not understand the defendant, the court denied the application by concluding that FERNANDEZ spoke English well enough. Thus, during the trial, while FERNANDEZ at several times tried to tell me that there was no safe in the store when he was there, I shushed him up because I did not want to disturb the court and I didn't understand what he was trying to tell me. Moreover, the court itself was somewhat nettled by FERNANDEZ's jumping up and down as the court put it.

9. None of the matters hereinabove set forth can be demonstrated in their true perspective until and unless I have the entire trial transcript, and I ask that same be furnished to me at no cost in the interests of justice, for the defendant cannot afford to pay for same.

10. Moreover, I need time to properly present this motion for the court's consideration and I respectfully ask, that if the motion is not now granted out of hand, that I be given a reasonable

extension of time to complete my papers herein without falling victim to the jurisdictional requirement that the motion be made within seven days of the verdict.

S. SAMUEL W. GILMAN

Samuel W. Gilman

Sworn to before me this

5th day of May, 1977.

[Faint, illegible text]

PA/LH
1/1a

1 MR. GILMAN: Your Honor, before you bring
2 the jury in, I'd like to be heard.

3 THE COURT: Yes, sure, you can be heard.

4 MR. GILMAN: Your Honor, two days ago when
5 we were selecting this jury I asked the Court for
6 an interpreter before, and the Court did furnish
7 an interpreter, and I'm advised by the Government
8 that because I'm privately retained an interpreter
9 will not be furnished.

10 I tell the Court now that I believe the
11 defendant, Manuel Fernandez cannot afford the services
12 of an interpreter, and I say further that unless
13 an interpreter is furnished I shall have some
14 difficulty communicating with him, and he shall have
15 some difficulty understanding the proceeding, and
16 it will be highly prejudicial to him.

17 THE COURT: I already anticipated that, and
18 I was going to ask this defendant to stand before the
19 Court and ask him questions. It's this Court's
20 impression that he has a fairly good working knowledge
21 of the English language. You have been before me before.
22 You know how I operate.

23 My eyes are all over. I may look like I'm
24 not looking, but you can bet your life nothing gets
25 by me, and I think that that gentleman understands what

1 we are saying here.

2 I want him to step up before me. I want to
3 ask him questions, some questions not pertaining to
4 the case, and I'll find out whether he can speak
5 English sufficiently enough.

6 MR. GILMAN: Maybe your Honor doesn't under-
7 stand what I said. I can't communicate with him
8 because I don't understand him.

9 THE COURT: Well, we will find that out, too.
10 I think you can communicate with him, and I think
11 he knows what's going on, and I think that he's --
12 that his interpreter is something that he is seeking
13 now, and whether or not he's entitled to it is another
14 matter, but actually when he retains his own counsel
15 the rule is that he must retain any and all specialists
16 or anyone else that he wishes for his own defense.

17 I agree with you, and I will place it on the
18 record, that sometimes you're much better off being
19 an indigent person than an average citizen, income
20 earning person, because you must go broke under our
21 assistance before you can get all of the experts that
22 are required to defend yourself, and I agree there's
23 something wrong with that, but that's not for me to
24 determine what's wrong with the system.

25 The only thing I must determine, what I must

1 deal with the case are what the issues are in the
2 case and how do I proceed with the jury, and then
3 when I do give it to the jury. That's my position,
4 and that's my judicial obligation.

5 Now, Mr. Fernandez, how long have you been in
6 this country?

7 DEFENDANT FERNANDEZ: Maybe in 1965.

8 THE COURT: 1965. And what have you been
9 doing since 1965?

10 DEFENDANT FERNANDEZ: Working.

11 THE COURT: What kind of work have you been
12 doing?

13 DEFENDANT FERNANDEZ: Well, I work for the
14 carpet.

15 THE COURT: And did you have any education?
16 Did you go to any schools in America while you were
17 here?

18 DEFENDANT FERNANDEZ: Well, I went in the
19 beginning a few --

20 THE COURT: You went to what?

21 DEFENDANT FERNANDEZ: In the beginning.

22 THE COURT: In the beginning you went a few
23 months to school. What kind of school did you go to?

24 DEFENDANT FERNANDEZ: I went to me, in my house.

25 THE COURT: Well, was it a grammar school, a

1 secondary school or a night high school?

2 DEFENDANT FERNANDEZ: No. Call the English,
3 the second language or something.

4 THE COURT: English secondary?

5 DEFENDANT FERNANDEZ: Yes.

6 THE COURT: In other words, you were taught
7 the English language there?

8 DEFENDANT FERNANDEZ: Well, not very, very long.

9 THE COURT: In your job, did you talk Spanish
10 or English with your fellow employees?

11 DEFENDANT FERNANDEZ: I know of no employees.

12 THE COURT: Well, who did you work with?

13 DEFENDANT FERNANDEZ: I worked with some
14 American people.

15 THE COURT: And you talked English to them;
16 didn't you?

17 DEFENDANT FERNANDEZ: Well, I haven't had time
18 to understand.

19 THE COURT: He speaks a lot better English than
20 my mother did.

21 MR. GILMAN: Unfortunately, your Honor was never
22 in court --

23 THE COURT: At this time, the Court having
24 interrogated the defendant, the Court finds that he
25 speaks very, very well.

1 He responded and understood the nature of the
2 questions asked, and the Court will not permit him
3 to have a Spanish interpreter at the expense of the
4 Government.

5 DEFENDANT FERNANDEZ: Excuse me, your Honor.
6 Sometimes I have to repeat I have trouble to under-
7 standing.

8 THE COURT: Well, you will understand. We will
9 make sure. If you don't understand tell your lawyer,
10 and then we will repeat it for you.

11 Okay, all right.

12 (Whereupon, the jury entered the courtroom.)

13 THE COURT: We are now ready to start with the
14 trial, and first, I apologize for the delay, so to
15 speak, but there will be delays from time to time.
16 Just be patient and understanding. We will complete
17 the trial in its proper order, and within reasonable
18 time, and I'm certain that when it's all over with
19 that, you will have a better understanding of the
20 working of the Court and also the working of the
21 lawyers and also the problems that face the Court and
22 lawyers in expediting trials.

23 In any event, prior to the United States
24 Government, by its attorney, giving you an opening
25 statement, that will be the first thing that will

1 her. He's not one of the persons who are alleged
2 to have touched her.

3 MS. GAINEX: It's one conspiracy and one act.

4 THE COURT: She can testify to it as part of
5 the incident.

6 MR. ROSENKRANZ: What I am saying --

7 THE COURT: They are liable for each and every
8 act.

9 MR. ROSENKRANZ: I understand. But what I'm
10 saying is this, Judge, with that we are not facing
11 the hearing on the State robbery charge. We are
12 facing the Federal transportation through interstate.
13 I don't think it's relevant to the charge. I think
14 the testimony should be redacted.

15 THE COURT: I know what you are saying, it's
16 inflammatory.

17 MR. ROSENKRANZ: That's right.

18 THE COURT: You may take exception to the
19 ruling.

20 MR. ROSENKRANZ: Thank you.

21 MR. GILMAN: By the way, your Honor; was my
22 exception noted to your Honor's denial of the
23 interpreter?

24 THE COURT: Sure.

25 MR. GILMAN: Thank you.

1 drugs back.

2 You will hear that the mastermind here was that
3 defendant, Manuel Fernandez.

4 Remember I told you that this case involved
5 stolen antique oriental rugs. Not your ordinary
6 everyday market items. People who deal in antique
7 oriental rugs have specific knowledge, and there's
8 only a select market for these items, and you will
9 learn that Manuel Fernandez is quite knowledgeable
10 about the rug business, and that he has many contacts
11 in the oriental rug business.

12 So, his role was, and what he in fact did, he
13 did what we call in the street vernacular, fingered
14 the job in New Jersey. That is, he told the others
15 where to go to rob the rugs, where they could find
16 quality goods, and the plan was, they were thereafter
17 to bring the rugs back to Brooklyn, to Fernandez and
18 others, and he would -- again in the vernacular --
19 fence the rugs; that is, he would have buyers for
20 those oriental rugs, because remember, we are talking
21 about a select market here, and of course each one
22 would share in the proceeds from the sale of these
23 goods according to the respective duties they had,
24 according to where they fit in the organization of
25 the scheme.

THE COURT: Yes.

MR. GILMAN: Ask it be stricken.

THE COURT: You were there, sir?

THE WITNESS: Yes.

THE COURT: He said he was there.

MR. GILMAN: I can't hear you.

THE COURT: He said he was there, all right.

THE WITNESS: I was at the bar also when the information was given to Tony Ferrante as to the location of where this particular score was to take place.

BY MS. GAINES:

Q What do you mean by "a score?"

A Stick up, a robbery.

Q And what was supposed to be robbed?

A Oriental rugs.

Q And did Fernandez tell Ferrante what the location was to be?

A Yes. He explained the whole thing, and even had a little paper where the location of the rugs would be located in the store, and mainly not to forget to take the rugs that were in the safe.

Q Did he state where the store was at, meaning Fernandez?

2 Q Where was Jose?

3 A At the time, I don't think Jose was there,
4 but when the door was opened, Jose came running into the
5 place.

6 Q Continue telling us what happened?

7 A Anyway, Barry got something from the back room.
8 Meanwhile, Chuck was holding the girl.

9 Q And where was Chuck holding the girl?

10 A Right in the vestibule of the store itself,
11 and Barry went over and broke the door over with something,
12 whatever it was, and then somebody says, "Don't forget the
13 safe. The safe first," and Barry brabbed the girl again
14 by the throat and he dragged her over to the door and asked
15 if she would open the safe. He say, "You know you've got the
16 combination," and she was shaking and everything. She
17 complied. She opened the safe.

18 Q Would you describe this woman to us, please?

19 MR. GILMAN: Describe what?

20 A She was --

21 Q One minute. Would you describe this woman
22 to us, please?

23 A She was very petite, attractive. She had a
24 very pretty face, dark complexion, sort of olive complexion,
25 black hair, short cut, nicely dressed, and a wedding band on

her left finger, left hand.

Q Continue telling us what happened?

A Well, she took a little time. She was very nervous, shaking about opening the safe, and finally she did, and they took -- after the safe was opened we started, Jose, Tony and myself, we started taking the rugs out of the safe and putting them outside on a little platform out there, like a stairwell going down.

Q And who was taking these rugs?

A Myself, Jose and Tony in the beginning. Then, Tony -- Tony jumped downstairs off the platform and started putting them on the truck and when Barry and Chuck got finished tying the girl up, they came out and started taking the stuff out also.

Q Where was the girl at this time?

A They tied her up and put her in the bathroom.

MR. ROSENKRANZ: Object to the word "they."

A Chuck and Barry tied her up and put her in the bathroom.

Q Continue.

A While this was going on, only Chuck remained in the bathroom with the girl at the time, and Barry came out, and started taking the rugs out with us, and I didn't see the girl anywhere, so I asked Barry what happened to the

10 1

2 A Non-rush hours, from the door of my shop
3 through the Lincoln Tunnel can run anywhere from an hour
4 to an hour and ten minutes.

5 Q Would you agree that to get from the Lincoln
6 Tunnel to Brooklyn would approximately be another half hour?

7 A I only had occasion recently to come to
8 Brooklyn. I can't tell you anything about that.

9 Q You say approximately an hour to an hour and
10 ten minutes in non-rush hour traffic from your store to
11 the New York side of the Lincoln Tunnel?

12 A That is taking the route I take. That is
13 route 1 to exit 9, to 16, through the Lincoln Tunnel.

14 Q Would you say that you try to take the quickest
15 or longest route?

16 A What I believe to be the quickest route.

17 MR. ROSENKRANZ: Thank you very much.

18 THE COURT: All right.

3PM
Txi

R 2

19 CROSS-EXAMINATION

20 BY MR. GILMAN:

21 Q Mr. Kahn, when is the last time you saw
22 Manuel Fernandez?

23 A You mean apart from here in Brooklyn?

24 Q In your store.

25 A Let me see, I would say that it was late into --

Kahn-cross-Gilman

11 1

2 I was thinking late into '74.

3 Q That was the last time?

4 A To my recollection. I don't have -- it's not
5 the type of thing that stood out in my mind. It could have
6 been a little earlier or later.

7 Do you remember giving rugs to Manuel
8 Fernandez on memorandum?

9 A Again, I should clarify, with the exception
10 of one particular item which was not on memorandum, the
11 items were always given to Mr. Fernandez and Mr. Shamash.
12 When I would be paid for a rug it would be only by Mr.
13 Shamash.

14 Q When you gave the items, did he pay for them
15 immediately on the spot?

16 A There were occasions when -- there were
17 occasions when I would be paid by check on the spot. There
18 would be occasions when they said they wanted to show the
19 rug to a customer. And there would be some time lapse
20 and one occasion when I gave a rug to Mr. Fernandez which
21 he said he wanted for himself and after a long period of
22 time and returned to me unable to pay for it.

23 Q The others were all paid for?

24 A I don't believe there was a rug given out
25 that wasn't returned or paid for.

MR. GILMAN: Thank you.

MS. GAINNEY: I just have one.

REDIRECT EXAMINATION

BY MS. GAINNEY:

Q Since the last time you saw Mr. Fernandez in your shop, have you seen Mr. Fernandez?

A Yes, I have seen him on the street in Manhattan occasionally. I have seen him in the shops of a couple of other rug dealers, apparently taking items for repair work.

Let me see, I have seen him once or twice in the place where he occasionally works, at a Pillary on Madison Avenue.

Q Do you know an individual by the name of Larry Farlano?

A Yes.

MR. GILMAN: I must object unless this is connected in some way. I doubt it.

MS. GAINNEY: I do intend to connect it.

THE COURT: If you don't I will strike it.

MR. GILMAN: Will you be able to strike it from the minds of the jury?

THE COURT: I assume when the jury is told to disregard something they will disregard it.

A You asked me whether I know Larry Ferlano?

Q Yes.

A He is a personal friend of mine who deals in the same merchandise between 62nd and 63rd on Madison Avenue in Manhattan.

Q Has Larry Ferlano ever been in your shop?

A I believe the first time he had been in my shop would have been early in '76.

Q Do you know whether or not Larry Ferlano knows Manuel Fernandez?

MR. GILMAN: Now we are reaching.

THE COURT: Yes.

Q Have you ever seen Larry Ferlano in the company of Manuel Fernandez?

A I don't know in the company. I have seen them at the store.

MS. GAINES: I have no further questions.

THE COURT: All right. No questions?

You may step down, thank you.

MR. GILMAN: Wait, I have one more question, your Honor. If I may ask the witness from where he is standing.

RECROSS EXAMINATION

BY MR. GILMAN:

1
2 itself, remember how LaMorte tells you that Manuel
3 Fernandez fingered this job, he set it up, he told
4 them where to go for the rugs, and he told them it
5 will be an easy job, light touch, there will only
6 be two people there, a man and a woman.

7 What does Marianne LaRoche tell you?

8 Sure enough, when the first two individuals
9 come in, what are they concerned with? They want
10 to know where is the owner.

11 Isn't that the action of men who are expecting
12 someone else there, as they have been told by Manuel
13 Fernandez? They're looking hard for that second
14 individual, and she finally convinces them that he
15 is not there.

16 Also, LaMorte tells you that Manuel Fernandez
17 told him, "Go for the rugs in the safe. That's
18 where the valuable ones are."

19 After the robbery is announced, what does
20 Marianne LaRoche tell you?

21 That's one of the first things that they
22 wanted, "Give us the combination to the safe."

23 They're not leaving without that property in
24 the safe.

25 She is shaking so bad and is so terrified

1
2 she can't remember the number. They had to open it.

3 They went for the rugs in the safe, just as
4 Manuel Fernandez said, just as Vincent LaMorte told
5 you he had directed.

6 Let's look at Manuel Fernandez.

7 Now, LaMorte tells you how he says during this
8 meeting that "I know that owner, Mr. Kahn," names
9 him, "I have been in the store, know the women
10 there."

11 Now, what do Marianne LaRoche and Bob Kahn
12 tell you?

13 They know Manuel Fernandez. He has done
14 business there.

15 Could Vincent LaMorte have known that unless
16 Manuel Fernandez had told him?

17 Let's consider Manuel Fernandez even
18 further.

19 As you know, he is in the rug business,
20 quite knowledgeable, knows all the rug dealers
21 in oriental rugs -- forgive my pronunciation,
22 Sarouks, Kashghais, Kirmins -- forgive me, I may
23 be mixing up the names -- but he tells about these
24 people, their background, their merchandise, he is
25 familiar with all of this.

Now, remember we're dealing with oriental

9:00 P.M.

545

MS/LH
2/2

1 THE COURT: I have discussed with the
2 attorneys "knowingly, willfully, receive, control and
3 store, etc. Does this mean the person has to be
4 present?"

5 I have read to the attorneys what the Court
6 intends to charge in its own language in reference
7 to that note. The attorneys have consented but it
8 would be a proper charge at this time.

9 MR. ROSENKRANZ: Yes, your Honor.

10 MS. GAINES: So consented to by the Government.

11 MR. GILMAN: Yes, your Honor.

12 (Jury present.)

13 THE CLERK: Juror's note Court's Exhibit 3.

14 THE COURT: The Court has received a note
15 from the Foreman, which reads as follows:

16 "Count 2, knowingly, willfully, received,
17 control and store, etc., does this mean the person
18 has to be present?"

19 In Count 2, "Knowingly" and "willfully,
20 receives, controls and stores the goods", the defendant
21 or defendants need not necessarily have been present
22 and in full possession of the rugs. If you find that
23 they, one or both defendants, were aiders or abettors
24 as previously defined, and in constructive possession
25 of the rugs, then you may find one or both guilty of

1 2 Count 2. The Government has the burden of proof
2 in respect to all the elements as I have previously
3 defined, and must prove same to your satisfaction
4 beyond a reasonable doubt.

5 Is that sufficient for you?

6 (Jury leaves courtroom.)

7 9:15 P.M.

8 THE CLERK: Jury note marked Court's Exhibit 4.

9 (Jury present.)

10 THE COURT: All right, Mr. Foreman, have you
11 at a verdict?

12 MR. FOREMAN: Yes.

13 THE COURT: Would you please rise and announce
14 your verdict?

15 THE FOREMAN: We the Jury find Manuel Fernandez
16 guilty of all three counts.

17 THE COURT: How do you find as to Jose Garcia?

18 THE FOREMAN: We find Jose Garcia not guilty
19 on all three counts.

20 THE COURT: Is that your unanimous verdict?

21 THE FOREMAN: Yes.

22 THE COURT: Do you wish the jury polled?

23 MR. GILMAN: Yes.

24 THE CLERK: Juror No. 1, is that your verdict?

25 JUROR NO. 1: Yes.

THE CLERK: Juror No. 2, is that your verdict?

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

Plaintiff

against

MANUEL FERNANDEZ,

Defendant

Index No. 77-1476

AFFIDAVIT OF SERVICE
BY MAIL

STATE OF NEW YORK, COUNTY OF New York ss.:

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at
300 Belmont Avenue, Ocean, New Jersey 07712.

That on the 18th day of January 19 78 deponent served the annexed

Appendix

on Hon. David G. Trager, United States
attorney(✓) for the Eastern District of New York
in this action at 225 Cadman Plaza East, Brooklyn, New York
the address designated by said attorney(✓) for that purpose by depositing a true copy of same enclosed
in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care
and custody of the United States post office department within the State of New York.

Sworn to before me:

this 18 day of January

19 78

Samuel W. Gilman
.....
Samuel W. Gilman

Susan Higgins

SUSAN HIGGINS
Notary Public, State of New York
No. 03-4512917
Qualified in Bronx County
Certificate filed in New York County
Commission Expires March 30, 1979

